IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

PATRICK M. LUERS,	:	APPEAL NO. C-090108 TRIAL NO. A-0800497
Plaintiff-Appellant,	:	
vs.	:	*JUDGMENT ENTRY.*
ABUNDANCE TECHNOLOGIES, INC.,	:	
Defendant-Appellee.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Plaintiff-appellant Patrick Luers appeals the trial court's grant of summary judgment in favor of defendant-appellee Abundance Technologies, Inc., on his wrongful-termination claim, as well as the dismissal under Civ.R. 12(B)(6) of his remaining claims for breach of contract, promissory estoppel, unjust enrichment, and intentional infliction of emotional distress. For the following reasons, we affirm.

Luers was hired as a consultant by Abundance, an SEC-registered investment advisor that also conducted asset-management programs. Part of Luers's duties included marketing and selling Abundance's training seminars to financial advisors. Abundance had scheduled a "Beginner Training Seminar" for October 17-19, 2007, which 20 financial advisors had registered for in advance by paying an initial deposit

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

with a credit card. Two days before the seminar was to occur, Abundance had to cancel it due to a scheduling conflict with the instructor. On that same date, A. Lawain McNeil, Abundance's vice-president for sales and marketing, informed Luers of the cancellation. Luers, upset about the cancellation, contacted the president of Abundance and complained. All the financial advisors registered for the seminar either received a full refund of their deposits or made plans to attend a rescheduled seminar.

Luers's employment with Abundance was governed by an "Executive Employment Agreement" ("the contract"). Section 3 of the contract set forth Luers's compensation rights, which included a base salary and quarterly incentives equal to 10% of Luers's sales of educational and training services.

The contract had an effective starting date of June 6, 2005, and was to continue indefinitely unless it was terminated for one of the reasons set forth in the contract. Section 12.1 of the contract provided that either party could terminate the contract without cause by providing a 30-day notice to the other party. Consistent with that provision, in November 2007, Abundance gave written notice to Luers that Abundance was exercising its right under the contract to terminate Leurs's employment as of December 14, 2007.

In January 2008, Luers sued Abundance, asserting four claims. His first claim, pleaded ambiguously, actually asserted two grounds for recovery: breach of contract and wrongful discharge in violation of public policy. The remaining three claims were for promissory estoppel, intentional infliction of emotional distress and unjust enrichment. Under Civ.R. 12(B)(6), Abundance moved to dismiss Luers's complaint for failure to state a claim upon which relief could be granted. The trial

court granted the motion in part, dismissing all the claims except the one alleging wrongful discharge in violation of public policy. That claim survived because Luers had alleged that he had been fired because he had reported a supervisor's illegal conduct to the president of Abundance.

Following discovery, Abundance moved for summary judgment on Luers's wrongful-discharge claim, which the trial court granted because Luers had failed to submit any evidence demonstrating illegal conduct by the supervisor. Further, Luers could not identify any other public policy that was violated when his employment was terminated.

In the first of his two assignments of error, Luers now contends that the trial court improperly dismissed claims under Civ.R. 12(B)(6). We disagree.

We review the trial court's ruling de novo.[2] To dismiss a claim under Civ.R. 12(B)(6), it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief.[3] The court must presume that all factual allegations in the complaint are true and make all reasonable inferences in favor of the nonmoving party.[4]

With respect to his breach-of-contract claim, Luers asserts that in addition to the compensation set forth in the contract he was entitled to a quarterly commission. Specifically, he alleges that "[a]lthough not specifically written into the employment contract, this [additional commission] was agreed upon verbally by the two parties prior to the date of hire." But where a written contract is clear and unambiguous, courts must apply the plain language of the contract.[5] And the interpretation of

[2] *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, ¶5.
[3] *O'Brien v. University Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 327 N.E.2d 753, syllabus.
[4] *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753.
[5] See *Uebelacker v. Cincom Sys., Inc.* (1988), 48 Ohio App.3d 268, 271, 549 NE.2d 1210.

unambiguous contract terms is a matter of law.[6] Here, the contract unambiguously set forth Luers's compensation rights, which did not include an additional commission payment. Although Luers argues that he had evidence to support his claim that he was entitled to this additional compensation, the parol evidence rule prevents consideration of extrinsic evidence of negotiations that occurred before or while the agreement was being reduced to writing.[7] It is well established that a written agreement supersedes any prior oral agreement.

Further, we note that Luers did not allege that Abundance had breached the contract by failing to provide Luers with proper notice of his termination. Thus, given that the contract clearly did not provide for an additional commission and that the parol evidence rule would have excluded any evidence that Luers might have submitted, we hold that there were no set of facts upon which relief could have been granted. Accordingly, the trial court did not err by dismissing the breach-of-contract claim.

The trial court also did not err in dismissing the promissory-estoppel and unjust-enrichment claims, which were both based on Luers's allegation that he was entitled to an additional commission. It is well settled that "a quasi-contractual claim will not lie when the subject matter of the claim is covered by an express contract."[8] Here, the employment contract signed by Luers and Abundance covered Luers's compensation rights.

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[6] See *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684.
[7] See *Shifrin v. Forest City Enters., Inc.* (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499.
[8] See *Saraf v. Maronda Homes, Inc. of Ohio*, 10th Dist. No. 02AP-461, 2002-Ohio-6741 (where a written contract between the parties addresses the matter in dispute, the contract governs the parties' performance, and the equitable principles of quantum meruit and unjust enrichment are inapplicable); see, also, *Kashif v. Central State Univ.* (1999), 133 Ohio App.3d 678, 684, 729 N.E.2d 787, citing *Ed Schory & Sons, Inc. v. Soc. Natl. Bank* (1996), 75 Ohio St.3d 433, 662 N.E.2d 1074.

Finally, we hold that the trial court did not err by dismissing Luers's claim for intentional infliction of emotional distress. Luers's alleged in his complaint that he had suffered emotional distress due to his termination. But in Ohio, a breach of contract does not create a tort claim.[9] A tort claim based upon the same actions as a breach-of-contract claim "will exist independently of the contract action only if the breaching party also breaches a duty owed separately from that created by the contract, that is, a duty owed even if no contract existed."[10] Here, Abundance did not owe any duty to Luers other than those created by the employment contract, and Luers did not allege any other duty. Accordingly, there were no set of facts that Luers could have proved that would have entitled him to relief.

The first assignment of error is overruled.

In his second assignment of error, Luers maintains that the trial court erred by granting summary judgment to Abundance on the wrongful-termination claim. We are unpersuaded.

We review a grant of summary judgment de novo.[11] Summary judgment is proper when there are no issues of material fact in dispute, the party seeking summary judgment is entitled to it, and reasonable minds can only conclude in favor of the moving party.[12]

Luers alleged in his complaint that he had been terminated from his employment in violation of public policy. He alleged that he was fired because he had reported the cancellation of the training seminar, which Luers believed was

[9] *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.* (1996), 115 Ohio App.3d 137, 151, 684 N.E.2d 1261.
[10] Id.
[11] *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 1996-Ohio-336, 671 N.E.2d 241; *Flynn v. Westfield Ins. Co.*, 168 Ohio App.3d 94, 2006-Ohio-3719, 858 N.E.2d 858, ¶6.
[12] Id.

"unethical and/or illegal, or improper in its contractual relationships with clients and customers."

To establish a claim for wrongful discharge in violation of public policy, one must initially prove that a "clear public policy existed and was manifested in a state or federal constitution, statute[,] or administrative regulation, or in the common law (the *clarity* element) [and] that dismissing employees under circumstances like those involved in the plaintiff's dismissal would jeopardize the public policy (the jeopardy element.)"[13] These two elements are issues of law for the court.[14]

After reviewing the record, we hold that the trial court properly entered summary judgment in favor of Abundance because Luers did not satisfy the clarity element of a wrongful-discharge claim. Luers did not demonstrate that any public policy had been violated by his termination. Although Luers cited two sections of the Uniform Commercial Code–R.C. 1301.09 and 1301.11–neither of those sections nor any other section of the Uniform Commercial Code provides that breaching a contract is a violation of public policy. And if, as Luers argues, there is a common-law policy, favoring the enforcement of contracts, it merely recognizes that where a contract is proved to exist, then courts should enforce the remedies available against those who have breached the contract; they are not required ordinarily to compel a party to remain bound by the contract.

Here, the evidence demonstrated that although Abundance had abruptly cancelled a training seminar, it had either refunded the money already paid by the clients or rescheduled the clients for a future seminar. Even if we were to presume

[13] *Painter v. Graley*, 70 Ohio St.3d 377, 1994-Ohio-334, 639 N.E.2d 51, paragraph three of the syllabus.
[14] Id.

that Abundance had breached a contract with a third party, this was not illegal or even tortious conduct with respect to Luers. There is no public policy that, as a matter of general principle, protects people who enter into a private contract from having the other party breach the contract. Thus, Luers's act of protesting the cancellation of the seminar, as a matter of law, did not give rise to a claim for wrongful termination in violation of public policy.

The second assignment of error is overruled.

Therefore, the judgment of the trial court is affirmed.

Further, a certified copy of this judgment entry shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and **DINKELACKER, JJ.**

To the Clerk:

Enter upon the Journal of the Court on January 29, 2010
per order of the Court _____.
Presiding Judge